JUDGE BORK AND STANDING

A judge's views on standing -- whether the party before the court "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy"1 -- are apt to be central to his constitutional philosophy. As Justice Powell has written, "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper -- and properly limited -- role of the court in a democratic society."2 Standing is one of the crucial elements that differentiates the judicial from the legislative domain. It therefore implicates the separation of powers, which is, as Senator Moynihan has recognized, "the central principle of the Constitution."3

Worries have been expressed, for example by James Reston and Anthony Lewis in the op-ed pages of the New York Times, that Judge Bork's views on standing may be too restrictive, denying access to the courts where access ought to be allowed. It is perfectly proper to inquire whether a judicial nominee's views on adjudication are so restrictive that they might deprive an aggrieved person of relief to

which he was entitled. But a serious question demands a serious methodology, and not the scatter-shot snippet here, snippet there criticism to which Judge Bork has been unfairly subjected. A judge is entitled to be judged by his reasons. Judge Bork has written some half-dozen opinions+ on the subject of standing, three of which are sustained arguments concerning various aspects of the doctrine. To appreciate Judge Bork's views on the subject, one must, as Learned Hand remarked, "take the trouble to understand."

Judge Bork's most important contribution to the discussion of standing doctrine is to be found in his separate opinions in two cases involving efforts by members of Congress to use the courts to challenge the action of the executive branch or other members of Congress on the theory that these officers had diminished their effectiveness as legislators. The idea that members of Congress might have standing in such circumstances is a constitutional novelty, peculiar to the D.C. Circuit and dating only to 1974.5 In Vander Jagt v. O'Neill,6 Republican members of the House of Representatives brought a lawsuit complaining that their political influence had been wrongfully diluted by the majority Democrats, who allegedly had allocated disproportionately few committee and subcommittee seats to Republican members. The Court of Appeals held that federal courts could properly assert jurisdiction over such a complaint, but that in the exercise of what was called

"remedial" or "equitable" discretion, the court would refuse to decide the question.

Judge Bork agreed that the complaint should be dismissed, but wrote separately to argue that the proper basis for doing so was not the "discretion" of the court but rather the failure of the plaintiffs to establish their standing to maintain the action.7 In a lengthy, scholarly opinion, Judge Bork explained the complexities of the Supreme Court's delevoping standing doctrine. In order to be a "fit" person to try a claim, a litigant must have a "personal stake in the outcome of the controversy,"8 which in turn requires that there be an "injury in fact,"9 sometimes called a "judicially cognizable injury."10

But what is a "judicially cognizable injury"? "Courts may take cognizance only of injuries of certain types," wrote Judge Bork, "and the limitations are often defined less by the reality of the litigant's 'adverseness' than by the courts' view of the legitimate boundaries of their own power."11 It would be a mistake, Judge Bork argued, for courts to try to umpire the internal processes of the Congress, short, at least. of "a complete nullification" of a Representative's voting rights in contravention of "an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown."12 If courts attempt to assure intramural equity in the Congress, inevitably the judicial and legislative

branches would be drawn into what Justice Powell called "repeated and essentially head-on confrontations . . . [which] in the long run will [not] be beneficial to either."13

Judge Bork emphasized that he and the Vander Jagt majority parted company over "~~a disagreement about~~ the role of courts in our government."14 "My colleagues' disinclination to rest this case upon a jurisdictional ground -- whether that of standing or political question -- rests squarely on the erroneous notion . . . that there must be judicial power in all cases and that doctrines must not be adopted that frustrate that power."15

In Barnes v. Kline,16 Judge Bork explained why he found that theory of judicial power to be inconsistent with democratic principles.

> "Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers. A critical aspect of the idea of standing is the definition of the interests that courts are willing to protect through adjudication. A person may have an interest in receiving money supposedly due him under law. Courts routinely regard an injury to that interest as conferring upon that person standing to litigate. Another person may have an equally intensely felt interest in the proper constitutional performance of

the United States government. Courts have routinely regarded injury to that interest as not conferring standing to litigate. The difference between the two situations is not the reality or intensity of the injuries felt but a perception that according standing in the latter case would so enhance the power of the courts as to make them the dominant branch of the government. There would be no issue of governance that could not at once be brought into the federal courts for conclusive disposition. Every time the court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts.17

Barnes involved the challenge by members of the Senate and House of Representatives of the President's asserted right to "pocket veto" certain legislation during a sine die, intersession adjournment of the Congress. As Judge Bork noted, however, the principle that gives members of Congress standing to challenge actions by other branches that assertedly impinge on congressional prerogatives must be a subset of a much larger power.

This rationale would also confer standing upon states or their legislators, executives or judges to sue various branches of the federal government. Indeed, no reason appears why the power or duty being

vindicated must derive from the Constitution. One would think a legal interest created by statute or regulation would suffice to confer standing upon an agency or official who thought that interest had been invaded.18

Where would the exercise of such a power stop? Indeed, probably it should not stop -- unless one believes that if courts allowed themselves such a power, the basic question of political science -- who governs?19 -- might have to be answered in a way that would embarrass a self-respecting democracy.

It hardly requires an ultra-fastidious sensibility to perceive the possibility that judicial review of this character might be in tension with democratic practice and theory. Every judge on the D.C. Circuit who has had to face the problem has recognized it. The court has always appreciated that the "members have standing" doctrine is constitutionally ticklish. In most cases, it has sought refuge from the problem by the use of a questionable doctrinal expedient. Always pressing its claim to possess Article III jurisdiction over constitutional challenges brought by members of Congress, the court also claims a power, of no specific pedigree, which it calls "remedial" or "equitable" discretion, to decline to give judgment where doing so might be delicate because of the separation of powers.20

It has been said that Judge Bork's views of standing are out of the main channel of doctrinal development. This is incorrect. His views are in close accord with those of judges of many different ideologies ~~whose ideological coloration runs the entire spectrum of American jurists~~ -- Justices Frankfurter, Roberts, Black, Douglas,21 and Scalia22 and Judge J. Skelly Wright.23

In particular, Judge Bork's views on standing have been closely identified with those of Justice Lewis Powell,24 whom he has been nominated to replace on the Supreme Court. This identity of views will be an important feature of the public debate on Judge Bork's confirmation, and deserves to be shown in some detail. In Flast v. Cohen,25 Chief Justice Warren set forth the controversial view that, although other aspects of the case-or-controversy doctrine might serve to limit the role of the federal judiciary, the issue of standing "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." According to Flast standing was about whether the lawsuit would be "presented in an adversary context and in a form historically viewed as capable of judicial resolution."

Justice Powell was a forceful critic of this attempt to divorce standing doctrine from separation-of-powers concerns. In his concurring opinion in United States v.

Richardson,26 Justice Powell offered a powerful [illegible]:

[illegible] of standing requirements is directly related to the [illegible] judicial power. It seems to be inconsistent with allowing [illegible] taxpayer or citizen standing would significantly [illegible] role of power at the national level, a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the [illegible] branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence so critical to the [illegible] the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate actions of the other branches.

* * * *

[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power [of judicial review] articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual

citizens and minority groups against oppressive and discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

Justice Powell's argument was immediately taken up by Chief Justice Burger in Schlesinger v. Reservists Committee to Stop the War.27 "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract," wrote the Chief Justice for the Court, "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"28

The following year, Justice Powell's opinion for the Court in Warth v. Selden29 asserted that both the constitutional and "prudential" standing requirements are "founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." In similar vein, Justice Powell's opinion for the Court in Simon v. Eastern Kentucky Welfare Rights Organization30 pointedly

remarked that "[a] federal court cannot ignore this [standing] requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies."

In Valley Forge Christian College v. Americans United for Separation of Church and State,31 Justice Rehnquist, writing for the Court, repeated Justice Powell's earlier-expressed themes:32 "Proper regard for the complex nature of our constitutional structures requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."

It is in light of these developments in the Supreme Court that Judge Bork's opinion in Vander Jagt must be evaluated. Judge Bork relied on Valley Forge and on Justice Powell's leading standing opinions to argue that on separation-of-powers grounds, Republican members of the House of Representatives should not be able to summon the federal courts into ~~an~~ their internecine war with the majority Democratic party. The majority of the D.C. Circuit, however, maintained that notwithstanding developments in the Supreme Court's jurisprudence since the Circuit's seminal case of Kennedy v. Sampson, Republican members of the House did have standing to assert a claim, which, however, the court would

decline to entertain because of "concerns" about the separation of powers.

By asserting jurisdiction and then refusing to decide the case, Judge Bork argued in Vander Jagt, the court assumes "an unfettered discretion to hear a case or not,"33 "an unconfined judicial power to decide or not to decide,"34 thus indulging in "rudderless adjudication."35 Characteristically, he has said that if the power cannot be exercised in a principled way, the judiciary should not exercise it at all.36 In Judge Bork's book, the unprincipled exercise of judicial power counts as a serious evil -- as serious as the unprincipled refusal to exercise the judicial power in a case where its use is required by the implications and traditions of the Constitution. This has always been, and remains, the overriding theme of his work.37

The Supreme Court has since indicated that Judge Bork, and not the Vander Jagt majority, was correct about the relationship between standing and the separation of powers. In Allen v. Wright,38 Justice O'Conner, writing for the Court (and joined by Justice Powell), stated that "the law of Art. III standing is built on a single basic idea -- the idea of separation of powers." In reaching this conclusion, Justice O'Conner quoted at length from Judge Bork's opinion in Vander Jagt:

'All of the [case-or-controversy] doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'39

1. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

2. Warth v. Selden, 422 U.S. 490, 498 (1975).

3. See, Daniel Patrick Moynihan, The "New Science of Politics" and the Old Art of Government, 86 The Public Interest 22, 23 (1987).

As Antonin Scalia observed, "no less than five of the Federalist Papers [Nos. 47-49 (Madison), and 50-51 (Madison or Hamilton)] were devoted to the demonstration that the principle [of separation of powers] was adequately observed in the proposed Constitution." See The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk Law Review 881 (1983).

4. Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987); Telecommunications Research & Action Center v. Allnet Communications Services, 806 F.2d 1093, 1097 (D.C. Cir. 1986)(concurring opinion); Northwest Airlines, Inc. v. F.A.A., 795 F.2d 195 (D.C. Cir. 1986); Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985)(dissenting opinion); Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983)(concurring opinion); Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir. 1983)(concurring opinion).

5. Kennedy v. Sampson, 511 F.2d 430 (1974) (upholding the right of a United States Senator to challenge the President's use of the pocket veto). The Supreme Court has never passed on this standing question.

6. 699 F.2d 1166, 1177 (D.C. Cir. 1983)(concurring opinion).

7. It should be noticed in passing that Judge Bork's result in this case cannot be squared with criticisms that have lately been heard against him that he is a partisan or result-oriented judge.

8. Baker v. Carr, 369 U.S. 186 (1962).

9. See Reigle v. Federal Open Market Committee, 656 F.2d 873; cert. denied, 454 U.S. 1082 (1981).

10. Metcalf v. National Petroleum Council, 553 F.2d 176, 187 (D.C. Cir. 1977).

11. 699 F.2d at 1177.

12. See, Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), vacated on other grounds, 444 U.S. 996 (1979). Judge Bork's opinion in Vander Jagt argued that the court should have adhered to what he took to be the law of the circuit as established in Goldwater. It was unnecessary (and therefore inappropriate) to go further and inquire "whether a less permissive rule would be preferable." 699 F.2d at 1180.

In a subsequent case, Judge Bork concluded that this further inquiry was necessary and found the line drawn in Goldwater untenable: "not even the Goldwater 'nullification' test is adequate to the standing inquiry. When the interest sought to be asserted is one of government power, there can be no congressional standing, however confined." Barnes v.

Kline, 759 F.2d 21, 41, at 68 n.18 (D.C. Cir. 1985)(dissenting opinion), vacated as moot sub nom. Burke v. Barnes, ___ U.S. ___, 107 S.Ct. 734, 93 L.Ed.2d 732, 55 U.S.L.W. 4103 (1987).

13. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474 (1982)(Powell, J., concurring).

14. 699 F.2d at 1182.

15. 699 F.2d at 1184.

16. 759 F.2d 21, 41 (D.C. Cir. 1985)(dissenting opinion), vacated as moot sub nom. Burke v. Barnes, ___ U.S. ___, 107 S.Ct. 734, 93 L.Ed.2d 732, 55 U.S.L.W. 4103 (1987). Judge Bork's opinion rightly emphasized the novelty of the D. C. Circuit's "members have standing" doctrine, which first appeared in the cases 187 years after the adoption of the Constitution.

17. 759 F.2d at 44.

18. Ibid.

19. Robert A. Dahl, Who Governs? Democracy and Power in an American City (1961).

20. See, e.g., Reigle v. Federal Open Market Committee, 656 F.2d 873; cert. denied, 454 U.S. 1082 (1981); Moore v. U.S.

House of Representatives, 733 F.2d 946 (1984); cert. denied, ___ U.S. ___ (198_).

Judge Bork observed the longstanding authority for the proposition that federal courts must decide justiciable cases over which they have jurisdiction. 759 F.2d at 59. As he observed, in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), Chief Justice Marshall wrote: "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

As then-Circuit Judge Scalia scathingly wrote, "Had Justice Marshall only known the Turkish delights of remedial discretion [in Marbury v. Madison], he would have realized that it was not the unavoidable duty of the court ['to say what the law is.']" Moore v. U.S. House of Representatives, 733 F.2d 946, ___ (1984)(Scalia, J., concurring); cert. denied, ___ U.S. ___ (198_). Judicial review of legislation might never have been invented.

21. Coleman v. Miller, 307 U.S. 433, 461 (Frankfurter, J., dissenting).

22. Moore v. U.S. House of Representatives, 733 F.2d 946, ___ (1984)(Scalia, J., concurring); cert. denied, ___ U.S. ___ (198_).

23. See Goldwater v. Carter, 617 F.2d 697, 709 (D.C. Cir. 1979)(en banc)(opinion of Wright, J.).

24. With due respect, Mr. Anthony Lewis's implication to the contrary in his August 27, 1987 column, is mistaken.

25. 392 U.S. 83, 83, 100, 101 (1968).

26. 418 U.S. 166, 188, 192 (1974)(Powell, J., concurring).

27. 418 U.S. 208 (1974).

28. 418 U.S. at 222.

29. 422 U.S. 490, 498 (1975).

30. 426 U.S. 26, 39 (1976).

31. 454 U.S. 464, 474 (1982).

32. As Professor Abram Chayes observed, Valley Forge showed that Justice Powell had "persuaded the Court to adopt his view, and perhaps a little more." Public Law Litigation and the Burger Court, 96 Harvard Law Review 4, 12 (1982).

33. 699 F.2d at 1184.

34. Id. at 1185.

35. 699 F.2d at 1184.

36. Indeed, Judge Bork's objection here cuts even deeper, for he considers that even if the judiciary could exercise power in a principled way in such cases, it would be destructive for it to do so:

> Our democracy requires a mixture of both principle and expediency. . . . If the federal courts can routinely be brought in to pronounce constitutional principle every time the federal and state governments contend, then we will indeed become a "principle-ridden," in fact a judge-ridden, society.

759 F.2d at 55.

37. See, for example, Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana Law Journal 1, 2 (1971):

> The requirement that the [Supreme] Court be principled arises from the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests.

38. 468 U.S. 737, 752 (1984).

39. 468 U.S. at 7509, quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1177, 1178-79 (D.C. Cir. 1983)(Bork, J., concurring).

ROBERT H. BORK's CIVIL RIGHTS RECORD

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Robert H. Bork's civil rights record has attracted critical comment from several organizations during the past month. These groups have charged that Bork is insensitive to the interests of racial minorities and women, and that his interpretations of the civil rights laws are outside the mainstream of contemporary thought. These charges are typically based on a limited, often superficial analysis of a small number of Bork's positions.

This essay attempts to more thoroughly and intensively examine Judge Bork's entire civil rights record. It concludes that, while Judge Bork is a judicial conservative, he has consistently taken civil rights positions that are well within the mainstream of contemporary American legal thought. As described in this essay, Bork has emphatically condemned racial discrimination of all forms; as Solicitor General, he has argued for broad interpretation and enforcement of the federal civil rights laws; and, in cases raising substantive issues of civil rights law, he

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has almost always voted for civil rights claimants on the Court of Appeals. There are, to be sure, instances where Bork has opposed positions taken by civil rights groups. In all these cases, however, Bork's views were carefully reasoned and have been widely shared by other moderate or liberal commentators and by respected Justices on the Supreme Court.

I. RACE DISCRIMINATION

Judge Bork has emphatically condemned racial discrimination of all forms. From the beginning of his career, Bork emphasized the "ugliness of racism" and his own "abhorrence of racial discrimination." Likewise, Bork has always vigorously espoused his view that the Fourteenth Amendment contains "a core value of racial equality that the Court should elaborate into a clear principle and enforce against hostile official action." [2]

A. Brown v. Board of Education

Judge Bork's position on Brown v. Board of Education[3], reflects the strength of his convictions about racial equality. Bork has consistently praised Brown as one of the Court's "most splendid vindications of human freedom."[4] He has said that

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2. "The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 138,141 [hereinafter cited as "The Supreme Court"].

3. 347 U.S. 483 (1954).

4. Bork, "A History of American Justice: A Review," American Educator 25 (Winter 1982). In the same article, Bork condemned the Dred Scott decision as a "terrible mistake."

Brown was "surely correct"[5] and has repeatedly defended the Warren Court's desegregation of schools and other public facilities. In Bork's words:

> '[O]ne thing the Court does know: [the Fourteenth Amendment] was intended to enforce a core idea of black equality against governmental discrimination. . . [T]he Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced discrimination rule of Brown must overturn and replace the separate-but-equal doctrine of Plessy v. Ferguson."[6]

Or, as Bork said recently, Brown was clearly correct because "it has become perfectly apparent that as a matter of fact separate is never going to be equal in the area of race."[7]

B. Views on Post-Brown Decisions

Bork has also made it clear that the Fourteenth Amendment provides broad protection against state-sponsored racial discrimination in all contexts. Thus, he has applauded the Court's desegregation of public facilities throughout the South following Brown.[8] Likewise, he has agreed with landmark civil

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5. The Supreme Court at 141.

6. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14-15 (1971) [hereinafter cited as "Neutral Principles"].

7. The Constitution and the Courts: A Bicentennial Discussion Guide, League of Women Voters Education Fund, May 24, 1987.

8. Id. at 13-15. Bork, The Constitutionality of the President's Busing Proposals 13 (1972), citing with approval, Mayor and City

[Footnote continued next page]

rights victories like Loving v. Virginia[9] and NAACP v. Alabama.[10] In these and other contexts, Bork has written that racial classifications are "invidious" and therefore require exacting governmental scrutiny.[11]

C. Civil Rights Record as Solicitor General

Judge Bork's commitment to the principle of racial equality is also reflected in the positions he took during his tenure as Solicitor General. As Solicitor General, Bork successfully argued the rights of racial minorities in a number of landmark civil rights decisions. In Runyon v. McCrary, Bork's brief

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Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (prohibiting segregation on public vehicles); Gayle v. Brawder, 352 U.S. 903 (1956) (prohibiting segregation on buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (prohibiting segregation on golf courses); New Orleans City Park Imp. Assn v. Detiege, 358 U.A. 54 (1958) (prohibiting segregation in parks).

9. 388 U.S. 1 (1967). Loving struck down a state law forbidding interracial marriages. Bork has written that "[t]he equal protection ruling followed from prior cases and the historical purpose of the clause." Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1983).

10. 357 U.S. 449 (1958). In NAACP v. Alabama, the Court held that Alabama could not constitutionally force disclosures of a civil rights organization's membership lists because of the chilling effect this would have on the group's political activities. Bork has written that the decision was correctly decided and effectuated "a value central to the first Amendment." Bork, Neutral Principles at 8.

11. See pp. 31-33 infra; Bork, The Unpersuasive Bakke Decision, The Wall Street Journal, at 8 (July 21, 1978); Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1984).

successfully argued that section 1981 of the federal civil rights laws applied to racially discriminatory agreements between private persons.[12] In Virginia v. United States, Bork successfully defended the denial of Virginia's request to be exempted from the Voting Rights Act.[13] In United Jewish Organization v. Carey, Bork persuaded the Court that the Fourteenth and fifteenth Amendments permitted a race-conscious electoral redistricting scheme which was deliberately drawn to enhance minority voting strength.[14] In Lau v. Nichols, Bork persuaded the Court that California's failure to provide English language instruction to students of Asian ancestry violated the Civil Rights Act.[15] And Franks v. Bowman Transportation Co., and Albemarle Paper Co. v. Moody, Bork's brief successfully argued for broad civil rights remedies under Title VII.[16]

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12. 427 U.S. 160 (1976). Justices White and Rehnquist dissented from the Court's decision in McCrary. They refused to accept Bork's argument and concluded that section 1981 did not apply to a private school that denied admission to racial minorities. Justices Powell and Stevens concurred, but also expressed grave doubts about the correctness of the Court's decision.

13. 420 U.S. 901 (1975). Chief Justice Burger and Justices Rehnquist and Powell dissented from the Court's decision in Virginia v. U.S. upholding Bork's argument.

14. 430 U.S. 144 (1977). Chief Justice Burger dissented from the Court's decision upholding New york's race-conscious redistricting in UJO.

15. 414 U.S. 563 (1974).

16. 424 U.S. 747 (1976); 422 U.S. 405 (1975).

Solicitor General Bork also urged positions on behalf of racial minorities that a majority of the Court found too sympathetic to civil rights interests. In Beer v. United States, the Court rejected Bork's argument that a New Orleans reapportionment plan diluted minority voting strength.[17] In Teamsters v. United States, Bork's brief unsuccessfully argued that a race-neutral seniority system violated Title VII by perpetuating the effects of prior racial discrimination.[18] In Washington v. Davis,[19] Bork's brief unsuccessfully argued that Title VII prohibited an employment test that had discriminatory effects.[20] And in Pasadena Board of Education v. Spangler, the Court refused to accept Bork's argument that a school district could be judicially required on an ongoing basis to achieve more perfect racial balances.[21]

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17. 425 U.S. 130 (1976). Justices Stewart, Burger, Blackmun, and Rehnquist rejected Bork's view in Beer. Justices Brennan, White and Marshall dissented, accepting the position urged by Bork.

18. 431 U.S. 324 (1977). Teamsters involved several issues. A unanimous Court agreed with Bork's argument that statistical evidence showed a system-wide pattern of discrimination against racial minorities. But Justices Stewart, Burger, White, Blackmun, Powell, Rehnquist, and Stevens rejected Bork's argument that the company and union's seniority system violated Title VII by perpetuating past discrimination. Justices Marshall and Brennan partially dissented, adopting the application of Title VII to seniority systems that Bork argued.

19. 426 U.S. 229 (1976).

20. 418 U.S. 717 (1974).

21. 431 U.S. 324 (1977). Justices Rehnquist, Burger, Stewart, White, Blackmun and Powell joined in rejecting Bork's argument in Spangler. Justices Marshall and Brennan dissented.

Despite all this, it would be incorrect to suggest that Bork always took positions as Solicitor General identical with those urged by civil rights groups. In Milliken v. Bradley, Bork argued for limiting school desegregation relief in some instances.[22] He urged that judicial remedial orders be limited to school districts in which civil rights violations had occurred or in which the racial composition of schools had been substantially affected by discrimination in other districts. The Supreme Court accepted Bork's position.[23]

In City of Richmond v. United States, Bork argued that the annexation of a largely white suburb, coupled with a change to single-member wards, did not have the purpose or effect of abridging voting rights protected by the Voting Rights Act. Bork relied on the fact that minority voting strength was fairly reflected in the post-annexation city. The Supreme Court substantially adopted Bork's view.[24]

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22. 418 U.S. 717 (1974).

23. Justices Burger, Stewart, Blackmun, Powell and Rehnquist agreed with Bork's position. Justices Douglas, White, Marshall and Brennan dissented. See also Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). The Department of Justice took positions substantially the same as that in Milliken in cases both before and after Bork's tenure as Solicitor General. E.g., Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). Where system-wide discrimination occurred, Bork supported system-wide remedies. E.g., Ferguson Reorganized School District R-Z v. United States, 423 U.S. 951 (1975); Bowen v. United States, 421 U.S. 929 (1975).

24. 422 U.S. 358 (1975). Justices White, Burger, Stewart, Blackmun and Rehnquist agreed with Bork's position. Justices

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Civil rights groups would, of course, have preferred Bork to have taken different positions in Milliken and City of Richmond. Nonetheless, his views plainly were principled, moderate interpretations of the civil rights law; indeed, in both cases the Court substantially agreed with Bork's arguments. More important, these cases should not obscure Bork's overall record as Solicitor General. In addition to the cases described above, my rough count indicates that the Supreme Court decided 20 substantive civil rights cases during Bork's tenure as Solicitor General, that did not involve suits against the federal government.[25] Justice Brennan agreed with Bork in 16 of the 20 cases, while Justices Rehnquist and Burger agreed with Bork in only 8 cases. While statistics like this cannot provide a complete picture, they do support the proposition, developed from individual cases, that Bork sympathetically interpreted and vigorously enforced the civil rights laws as Solicitor General.

[Footnote continued from preceding page]

Brennan, Douglas and Marshall dissented. Justice Powell was recused.

25. As Solicitor General, Bork was, of course, called upon to represent the U.S. government against civil rights plaintiffs, as his predecessors and successor have also done. See Califano v. Goldfarb, 430 U.S. 199 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Mathews v. Diaz, 426 U.S. 67 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Hills v. Gautreaux, 425 U.S. 284 (1976).

D. Court of Appeals Record

As a judge on the Court of Appeals, Bork's voting record in civil rights cases has solidly supported minority rights. Bork has voted for one or more civil rights claims in seven out of the nine decisions he has rendered involving substantive interpretations[26] of civil rights laws protecting minorities or women.[27] In the two cases where Bork rejected the plaintiff's claims, the Supreme Court later reversed the Court of Appeals and adopted Bork's position.[28] Bork's judicial voting record on civil rights issues simply does not support the charge that he is insensitive to minority interests; rather, he has tended to vote for civil rights plaintiffs, even in cases where this required a broad reading of the civil rights laws.

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26. In two cases involving procedural rules for Title VII claims, Judge Bork joined opinions liberally interpreting the statutory period during which complaints may be brought. Jarell v. U.S. Postal Service, 753 F.2d 1088 (D.C. Cir. 1985); Nordell v. Heckler, 748 F.2d 417 (D.C. Cir. 1984).

27. Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987); Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985); Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983); Emory v. Sec'y of Navy, 819 F.2d 291 (D.C. Cir. 1987); Ethnic Employees of Library of Congress v. Boorstein, 751 F.2d 1405 (D.C. Cir. 1984); City Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (1983) and 596 F. Supp. 35 (1984); Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983).

28. Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694, 725 (D.C. Cir. 1985) (Bork, J., dissenting), reversed Department of Transportation v. Paralyzed Veterans of America, 106 S.Ct. 2705 (1986); Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc), reversed, Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986). Vinson is discussed in detail at pp. 27-30 infra.

II. SEX DISCRIMINATION

Judge Bork has also afforded women the full protection of the federal civil rights laws. Although his record in this area is not as extensive as it is in the race discrimination field, Bork's general views can be developed from his record as Solicitor General and on the Court of Appeals. As Solicitor General, Bork's brief unsuccessfully argued in General Electric Co. v. Gilbert, that Title VII's prohibition against sex discrimination applied to discrimination of the basis of pregnancy.[29] His brief successfully argued in Corning Glass Works v. Brennan, that the Equal Pay Act forbad paying males higher wages for night shift position than females received for substantially similar day shift positions.[30]

Judge Bork's voting record on the Court of Appeals also reflects his commitment to enforcing prohibitions against sex discrimination. For example, Bork agreed in Ososky v. Wick, that the Equal Pay Act applied to promotions in the Foreign Service's merit system.[31] Bork also joined an opinion allowing proof of

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29. 429 U.S. 125 (1976). Justices Rehnquist, Burger, Stewart, White and Powell rejected Bork's argument, with concurrences from Justices Stewart and Blackmun. Justices Brennan, Marshall and Stevens accepted Bork's position.

30. 417 U.S. 188 (1974). Justices Marshall, Douglas, Brennan, White and Powell upheld Bork's position; Justices Burger, Blackmun and Rehnquist dissented.

31. 794 F.2d 1264 (D. C. Cir. 1984).

sex discrimination (including intentional discrimination) solely through statistical evidence.[32] Similarly, Bork joined (or authored) a per curiam opinion in Laffey v. Northwest Airlines, Inc., upholding substantial back pay awards for violations of the Equal Pay Act.[33] Finally, as discussed in detail below, Judge Bork's opinion in Cosgrove v. Smith, indicates that he will afford women substantial protection against sex discrimination under the Equal Protection Clause.[34]

III. CRITICISMS OF JUDGE BORK'S CIVIL RIGHTS RECORD

Despite Bork's consistent condemnation of racial discrimination, his vigorous advocacy as Solicitor General for broad civil rights protections for minorities and women, and his solid civil rights voting record on the Court of Appeals, some opponents have criticized the Judge's civil rights positions. Emblematic of this criticism is Renata Adler's assertion is that Bork "find[s] in any decision that strikes down state enforcement of racial discrimination an unconscionable instrusion on some right or 'freedom' to discriminate on racial grounds."[35] These

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32. Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987) (Wald, Bork, H. Greene).

33. 740 F.2d 1071 (D.C. C. 1984).

34. 697 F.2d 1125, 1146-47 (D.C. Cir. 1983).

35. R. Adler, Coup at the Court, The New Republic 37, 40 (September 14 & 21, 1987) (emphasis in original).

criticisms are typically superficial or misleading and ignore the substantial contributions to the rights of minorities and women that Judge Bork has made.

A. Shelley v. Kraemer

Bork's opponents have frequently cited his criticism of Shelley v. Kraemer, to support charges of racial insensitivity.[36] This criticism cannot survive fair-minded scrutiny.

In Shelley v. Kraemer, the Supreme Court held that the Equal Protection Clause forbad a state court from enforcing a racially discriminatory clause in a private land deed.[37] The Court's decision was politically and morally satisfying. Nonetheless, many academic commentators and public figures have been unable to reconcile the Shelley rationale with the Fourteenth Amendment's "state action" requirement.[38] As Bork wrote in 1971, Shelley's reasoning "converts an Amendment whose text and history clearly show it be to aimed only at governmental discrimination into a sweeping prohibition of private discrimination." (Emphasis added.)

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36. E.g., ACLU, at 11; Adler, at 40-42.

37. 334 U.S. 1 (1948).

38. It is, of course, elementary that the Fourteenth Amendment only applies to the actions of the states or their instrumentalities. See L. Tribe, American Constitutional Law 1154 et seq. (1979); J. Nowak, R. Rotunda, J. Young, Constitutional Law section 12.1 (1986).

Bork's view that Shelley's rationale was overbroad has been shared by numerous constitutional scholars of all ideological persuasions.[39] Similarly, the Supreme Court itself has refused to follow Shelley's rationale in subsequent cases.[40] Finally, the practical import of Shelley has long since been severely confined. The enactment of Title VIII and the Court's interpretation of section 1981 have prohibited racial discrimination in a wide range of private agreements -- thus making it unnecessary to rely on the Fourteenth Amendment. Indeed, as described earlier, it was Solicitor Bork who successfully argued in Runyon v. McCrary, that section 1981 applied to racially discriminatory private agreements.[41]

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39. Professor Lawrence Tribe has explained that "to contemporary commentators, Shelley appear[s] as [a] highly controversial decision" which "consistently applied, would require individuals to conform their private agreements to constitutional standards." L. Tribe. American Constitutional Law 1156 (1979). See also Pollak, Racial Discrimination and Judicial Integrity, 108 U. Pa. L. Rev. 1, 12-18 (1959); van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3, 44-47 (1961); Choper, Thoughts on State Action, 1979 Wash. U.L.Q. 757, 762; Wechsler, Toward Neutral Principles of Constitutional Law, in Principles, Politics and Fundamental Law 3, 47 (1961); G. Gunther, Constitutional Law 879-80 (1985) ("The efforts to find principled limits on the broadest implications of Shelley have produced extensive commentary on and off the Court.").

40. See Evans v. Abney, 396 U.S. 435 (1970); Lugar v. Edmonson, 457 U.S. 922 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). See R. Kluger, Simple Justice 528 (1976) (Shelley "had no lasting impact").

41. 427 U.S. 160 (1976).

B. Reapportionment

Opponents have also faulted Bork's views on the Supreme Court's reapportionment decisions.[42] Unlike some respected, mainstream thinkers,[43] Bork has consistently taken the position that was correct in holding that reapportionment decisions are justiciable in federal court.[44] But Bork also has taken the position that the Constitution does not dictate the "one-man, one-vote" rule adopted in Reynolds v. Sims.[45] In doing so, Bork echoes the view of Justices Harlan, Stewart and Clark:[46]

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42. ACLU, at 14.

43. Justices Harlan and Frankfurter vigorously dissented in Baker v. Carr, reasoning that reapportionment controversies were "political thickets" incapable of judicial resolution. See also Neal, Baker v. Carr: Politics in Search of Law, 1962 Sup. Ct. Rv. 252; Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119; A. Bickel, The Supreme Court and the Idea of Progress (1970).

44. 369 U.S. 186 (1962). See Bork, Neutral Principles, supra, at 18-19; Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Committee on the Judidiary, 93 Cong., 1st Sess. 13-14 (1974) ("I think the Supreme Court was quite right in Baker against Carr in going into the reapportionment field.") [hereinafter cited as "1973 Hearings"].

45. 377 U.S. 533 (1964). See, e.g., Bork, Neutral Principles, supra, at 19; Bork, The Legitimacy of the Supreme Court, in The Supreme Court and Human Rights, 327, 242 (1982); 1973 Hearings at 13.

46. All three Justices dissented in whole or in part in Reynolds v. Sims, and its companion cases. See also Lucas v. Forty-fourth General Assembly, 377 U.S. 713, 753-54 (1964); Bickel, The Supreme Court and Reapportionment, in the 1970s, 57-59 (Polsby ed. 1971).

> "I think Justice Stewart had what I would consider the correct approach which would be to say 'Show me a rational apportionment plan, show me that the majority of the people in that State can change that apportionment plan when they wish to and I will approve it."[47]

This general approach to reapportionment cases was widely shared by academic commentators and public figures,[48] and has increasingly influenced many of the Court's more recent reapportionment decisions.[49] There is no basis for characterizing these views -- widely-shared by moderates and liberals on and off the Court -- as either extreme or insensitive to minority interests.[50]

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47. 1973 Hearings at 13.

48. Martin, The Supreme Court and State Legislative Apportionment: The Retreat from Absolutism, 9 Val. U.L. Rev. 31 (1974); Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup. Ct. Rev. 1; A. Bickel, The Supreme Court and The Idea of Progress (1970); Dixon, the Court, the People, and "One Man, One Vote," in Reapportionment in the 1970's 7 (Polsby, ed.; 1971); Rae, Reapportionment and Political Democracy, in Id. at 91; Jewell, Commentary, in Id. at 46; Symposium: One Man-One Vote and Local Government, 36 Geo. Wash. L. Rev. 689 (1968); McCloskey, Foreward: The Reapportionment Case, 76 Harv. L.Rev. 54, 74 (1962); M. Shapiro, Law and Politics in the Supreme Court 227-30 (1964); Baker, One Man, One Vote, and "Political Fairness," 23 Emory L.J. 701 (1974); Clinton, Further Explorations in the Political Ticket: The Gerrymander and the Constitution, 59 Iowa L. Rev. 1, 4-8 (1973) (rigid one-man, one-vote rule may facilitate gerrymandering); A. Cox, The Court and the Constitution 301-04 (1987) (criticizing Sims although noting it has not produced the difficulties Cox feared).

49. E.g., Abate v. Mundt, 403416 U.S. 182 (1971) (11.9% deviation from equality permitted); Mahan v. Howell, 410 U.S. 315 (1973) (16.4% deviation from equality permitted); Brown v. Thomson, 463 U.S. 835 (1983) (60% deviation from equality permitted); Gaffney v. Cummings, 412 U.S. 735 (1973) (no justification at all required for "minor deviations" from equality).

50. As described earlier, Bork successfully argued as Solicitor General that Virginia should not be exempted from section 5 of

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C. Harper v. Virginia Board of Elections

Some critics have also faulted Judge Bork's reservations about the Court's rationale in Harper v. Virginia Board of Elections,[51] Harper held that Virginia's nondiscriminatory $1.50 poll tax violated the Fourteenth Amendment's Equal Protection Clause. Bork has criticized the Court's reliance on the Equal Protection Clause, primarily because the Virginia tax was a relatively modest burden imposed in an equal, nondiscriminatory fashion to all voters.[52]

Importantly, Bork narrowly confined his criticism of the Harper rationale. First, he made it clear that he thought the Harper result might well be justified by other constitutional guarantees (particularly, the Republican form of Government Clause, Art. IV, section 4).[53] Second, Bork emphasized that the

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the Voting Rights Act. Virginia v. United States, 420 U.S. 901 (1975). He also unsuccessfully argued that a New Orleans reapportionment plan unlawfully diluted black voting power. Beer v. United States, 425 U.S. 130 (1976). See also County Council of Sumter County, South Carolina v. United States, 596 F. Supp. 35 (1984); 555 F. Supp. 694 (1983) (extending coverage of Voting Rights Act).

51. 383 U.S. 663 (1963).

52. 1973 Hearings, at 17 ("that case, as an equal protection case, seemed to me wrongly decided") (emphasis added).

53. Id. ("It might have been decided the same way . . . . It seems to me that a lot of those cases are really essentially

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Harper tax did not present any question of racial discrimination, and that if it had, it plainly would have been unconstitutional. In Bork's words:

> "There was no evidence or claim of racial discrimination in the use of the poll tax. If there had been, of course, it would be properly an equal protection case and the result would have come out just the way it did."[54]

Third, Bork's views on the Harper Court's Equal Protection theory have been widely shared by jurists and commentators of all ideological dispositions.[55] Fourth, a number of the Court's subsequent decisions refused to follow the broad implications of Harper.[56] Finally, Bork's views on Harper have no practical

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republican form of government clause cases and maybe you can uphold that decision on a theory like that rather than on an equal protection theory . . . I think it is a question of degree. It depends on the size of the poll tax.")

54. 1973 Hearings, at 17 (emphasis added).

55. Justices Black, Harlan and Stewart dissented in Harper on the grounds that "it is all wrong for the Court to accept the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious." See Butler v. Thompson, 341 U.S. 937 (1951 (Court rejects challenge to Virginia's poll tax); Breedlove v. Suttles, 302 U.S. 272 (1937) (Court rejects constitutional challenge to $1 poll tax; per Justices Hughes, Brandeis, Stone, Cardozo and Black).

56. San Antonio v. Rodriquez, 411 U.S. 1 (1973) (Court, per Justice Powell, rejects heightened Equal Protection scrutiny for wealth-based classification); Richardson v. Raminez, 418 U.S. 24 (1973) (felons can be denied voting rights); Oregon v. Mitchell, 400 U.S. 112 (1970) (minimum age requirement for voters).

implications. As Bork explained in 1973, "I do not think it is an issue of any sort today and I certainly am not interested in reviving it as an issue."[57] Some civil rights groups may prefer Justices who would broadly read the Equal Protection Clause to forbid all sorts of wealth-based classifications. But Bork's refusal to do so reflects the consensus view of mainstream thinkers and jurists. This position simply does not provide a fair-minded basis for criticizing Bork's civil rights record.

D. Katzenbach v. Morgan

Critics have also questioned Judge Bork's views on South Carolina v. Katzenbach,[58] and Katzenbach v. Morgan,[59] Bork has consistently agreed with and praised South Carolina v. Katzenbach, where the Court upheld the Voting Rights Act's across-the-board suspension of literacy tests for voting in states with histories of racial discrimination.[60] In Bork's view, section 5 of the Fourteenth Amendment grants Congress broad

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57. 1973 Hearings, at 17.

58. 383 U.S. 301 (1966).

59. 384 U.S. 641 (1966).

60. In contrast to Bork, Justice Powell has expressed reservations about the correctness of South Carolina v. Katzenbach. See United States v. Sheffield Board of Commissioners, 435 U.S. 110, 139 (1978) ("reservations as to the constitutionality "of the Act's selective coverage of certain states only and to the intrusive preclearance procedures") (Powell, J., concurring); City of Rome v. United States, 446 U.S. 156, 170 (1980).

remedial authority to eradicate unlawful racial discrimination.[61]

While applauding South Carolina v. Katzenbach, Judge Bork has criticized the rationale of Katzenbach v. Morgan.[62] In Morgan, the Court held that section 5 of the Fourteenth Amendment empowered Congress to forbid the states from using English language literacy tests for persons who completed sixth grade in Puerto Rico.[63] Among other things, the Morgan Court apparently reasoned that the determination whether such literacy tests violated the Fourteenth Amendment could be made solely by Congress, rather than the Court.[64] Judge Bork has criticized this aspect

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61. See Bork, Constitutionality of the President's Busing Proposals 13, 16-17 (1972) ("It seems beyond doubt, then, that Congress has substantial power over the remedies used by federal courts, even in constitutional cases, and that the source of that power in desegregation cases is located in Section 5 of the Fourteenth Amendment."); 1973 Hearings at 16.

62. 384 U.S. 641 (1966).

63. The Court had recently held that nondiscriminatory literacy tests did not violate the Fourteenth Amendment. Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959).

64. In Archibald Cox's words:

> "The [Morgan] Court held that Congress effectively determined that a State [literacy] law violated the Fourteenth Amendment and set it aside even though the Supreme Court -- so often billed as the ultimate interpreter of the Constitution -- would have sustained the same State law." Cox, The Role of Congress in Constitutional Determination,, 40 Conn. L. Rev. 199, 228 (1971).

of the Morgan decision. In Bork's view, "[u]nder American constitutional theory, it is for the Court to say what constitutional commands mean and to what situations they apply."[65]

Bork's criticism of the rationale of Katzenbach v. Morgan has been widely shared. Justices Harlan and Stewart dissented in Morgan, warning that the majority's decision came "at the sacrifice of fundamentals in the American constitutional system -- the separation between the legislative and judicial function."[66] Justice Powell has taken the same view.[67] Similarly, in Oregon v. Mitchell, a majority of the Court rejected the Morgan rationale and refused to uphold Congress' attempt to lower voting ages in state elections.[68] Finally, academic commentators have also voiced criticisms of Morgan rationale much like Bork's.[69] Other academics have questioned whether there is any

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65. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); United States v. Nixon, 418 U.S. 683 (1974).

66. 384 U.S., at 659.

67. City of Rome v. United States, 446 U.S. 156, 200 (1980) ("Under section 2 of the fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights"), citing Katzenbach v. Morgan, 384 U.S. at 659 (Harlan, J., dissenting).

68. 400 U.S. 112 (1970).

69. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 80-101; Cf. Cohen, Congressional Power to Interprete Due process and Equal Protection, 27 Stan. L. Rev. 603 (1975); Burt, Miranda and Title II: A Morganic Marriage, 1969 Sup. Ct. Rev. 81 (historical evidence rejects Court's view of section 5 in Morgan);

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real difference between the Morgan Court's position tht section 5 grants Congress "substantive" power to interpret the Fourteenth Amendment and the Harlan/Powell/Bork position that section 5 grants Congress "remedial" authority.[70]

Judge Bork has applied his views about Morgan in a consistent, principled fashion. In 1981 the Senate Judiciary Committee considered a proposed "Human Life Statute."[71] The bill, which invoked Morgan's expansive view of Congress section 5 powers, would have defined human life as beginning at conception -- thereby "overruling" Roe v. Wade. Bork testified against the proposed legislation. He explained his view that a broad reading of the Morgan principle was not grounded in the Constitution because it "replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution."[72] As a result, he concluded that the

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Engdahl, Constitutionality of the Voting Age Statute, 39 Geo. Wash. L. Rev. 1, 3 n.10 (1970) (listing authorities; describing Morgan as "unprecedented, ill-considered, destructive of the foundations of constitutional law"). See also Morgan v. Katzenbach, 247 F. Supp. 196, 204 (D.D.C. 1965) (McGowan, J. dissenting) (sustaining Voting Rights Act on narrow grounds relating to Puerto Rico's status as a territory).

70. E.g., G. Gunther, Constitutional Law 960 (1985).

71. S. 158, H.R. 900, 97th Cong., 1st Sess. (1981).

72. Hearings on The Human Life Bill before the Subcommittee of Separation of Powers of the Committee on the Judiciary, 97th Cong., 1st Sess. 310 (1981) [hereinafter cited as "Human Life Hearings"].

proposed Human Life Statute was also unconstitutional because it infringed on "the Supreme Court's ultimate authority to say what the Constitution means."[73]

Bork also refused to rely on Morgan in his 1972 analysis of President Nixon's proposed busing legislation, although doing so would have readily permitted a conclusion that the proposals were constitutional.[74] Instead, Bork concluded that Nixon's proposals would be constitutional only if they could satisfy a number of demanding factual requirements derived from the Court's decisions in Brown v. Board of Education (II),[75] Swann v. Charlotte-Mecklenburg Board of Education,[76] and elsewhere. Bork emphasized that Congress could not ban busing altogether and that any limits on busing would be permissible only if they could be shown to be carefully designed and, in fact, likely to remedy the problem of segregated schools.[77]

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73. Id. at 309. Bork also testified that the Morgan principle would replace 'state legislatures with Congress for all matters now committed to state legislation." Id. at 310.

74. Bork, The Constitutionality of the President's Busing Proposals 11 (1971).

75. 349 U.S. 294 (1955)

76. 402 U.S. 1 (1971)

77. Bork, The Constitutionality of the President's Busing Proposals 16, 19-24 (1971). As other scholars have noted, see note 68 supra, Bork's interpretation of section 5 of the fourteenth amendment is solidly grounded in that provision's text: "Congress shall have power to enforce, by appropriate legisla-

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E. 1963 New Republic Article

Judge Bork's critics have also cited a 1963 article in The New Republic opposing the public accommodations provisions of the proposed Civil Rights Act.[78] Bork's article argued that debate over the proposed provisions should weigh the benefits of forbidding discrimination against the costs of regulating private conduct. While emphasizing the "ugliness of racism" and his "abhorrence of racial discrimination," Bork suggested that the proposed Act might unduly infringe on private autonomy.[79]

The New Republic article, written 25 years ago, came at an early stage in Bork's career, when he was experimenting with "libertarian" ideas. Bork has long since acknowledged the insensitivity of his 1963 statement and explicitly disavowed his earlier views:

> "I no longer agree with that article . . . I was on the wrong tack altogether. It was my

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tion, the provisions" of the fourteenth amendment. Likewise, Bork's interpretation is supported by the clear weight of historical evidence. See, e.g., Burt, Miranda and Title II: A Morganic Marriage, 1969 Sup. Ct. Rev. 81

78. Bork, "Civil Rights -- A Challenge", The New Republic August 31, 1963, at 21.

79. Bork also made it clear, however, that he thought the provisions in the proposed Civil Rights Act on voting rights and desegregation of public education [were] admirable." Chicago Tribune, March 1, 1964, section 1, p. 1.

> first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute and were that to be proposed today I would support it."[80]

The Senate did not raise the New Republic article in Bork's 1982 confirmation hearings.

F. The Bakke Decision

Finally, some opponents have challenged Bork's views on affirmative action. In particular, opponents have focused on a 1978 Wall Street Journal article[81] examining the Court's reasoning in Regents of the University of California v. Bakke.

Bakke, of course, involved an Equal Protection challenge to a state university's affirmative action program by an unsuccessful white applicant to the university.[82] A splintered Court held that state universities could consider the race of applicants in making admission decisions, but could not use numerical racial quotas.[83] Bork acknowledged that the Bakke

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80. 1973 Hearings, at 14-15 (emphasis added).

81. Bork, "The Unpersuasive Bakke Decision", The Wall Street Journal, at 8, col. 4 (July 21, 1978).

82. 438 U.S. 265 (1978).

83. There was no opinion of the Court in Bakke. Four Justices held that the Fourteenth Amendment permitted fixed racial quotas; four Justices did not reach the constitutional issue, holding instead that Title VI forbid a race-conscious admissions program.

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result might prove to be "a statesmanlike solution to an agonizing problem." But he went on to say that "in constitutional terms, [the Bakke rationale] is not ultimately persuasive."

Bork accepted Justice Powell's conclusion that all racial classifications trigger "strict judicial scrutiny" requiring a "compelling governmental interest" to justify the state's action. Bork disagreed, however, with Powell's argument that "university freedom" and the goal of a diverse student body satisfied the heightened scrutiny of racial classifications required by the Fourteenth Amendment. Bork did not consider whether other governmental interests might satisfy the applicable constitutional standard, although his piece may fairly be interpreted as expressing considerable skepticism about government efforts to justify racial classifications.[84]

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Justice Powell held that the Fourteenth Amendment did not permit the numerical racial quotes that had been used by the defendant university, but that some consideration of applicants' race was permissible.

84. Bork also disagreed with Justice Brennan's dissenting opinion, which would have permitted numerical racial quotas. Justice Brennan reasoned that minorities historically were not adequately represented at universities because of racial discrimination; Brennan concluded that, but for this discrimination, some minority applicant would have obtained the unsuccessful white applicant's position even without an affirmative action program. Bork responded that "the 14th Amendment's guarantee of equal protection [applies] to persons, not classes," and concluded that the Equal Protection Clause forbid the use of race as a general proxy for particular instances of discrimination.

The views advanced in Bork's 1978 article have been shared by jurists and commentators of all political leanings. Initially, it is important to recall that the constitutionality of affirmative action is a profoundly difficult, almost intractable problem. The Court, the academic community, and others have repeatedly grappled with the issue, without arriving at any meaningful consensus.[85]

Bork's 1978 article was directed at the rationale of Bakke, not the Court's ultimate result.[86] Constitutional scholars of all political leanings have expressed very similar difficulties with Powell's Bakke rationale.[87] Indeed, many

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85. See Regents of the University of California v. Bakke, 438 U.S. 265 (1978). (Court splits 4-1-4, with 5 separate opinions); De Funis v. Odegaard, 416 U.S. 312 (1974) (dismissed on mootness grounds); Fullilove v. Klutznick, 448 U.S. 448 91980) (Court splits 3-1-1-3-1); United States v. Paradise, 480 U.S. __ (1987) (Court splits 4-1-3-1). See also note 66 infra.

86. Bork, The Unpersuasive Bakke Decision, The Wall Street Journal, at 8 ("the court's power must be justified by constitutional reasoning . . . in constitutional terms [the Court's] argument is not ultimately persuasive"; "[Powell's] vision of the Constitution [in Bakke] remains unexplained") (emphasis added).

87. Lavinsky, DeFunis v. Odegaard: The "NonDecision" With A Message, 75 Colum. L. Rev. 520 (1975); Griswold, Some Observations on the DeFunis Case, 75 Colum. L. Rev. 512 (1975); Scadia, The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race, 1979 Wash. U.L.Q. 147; Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775 (1979); A. Bickel, The Morality of Consent 133 (1975) ("The lesson of the great decisions of the Supreme Court . . . [has] been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of

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respected jurists and scholars have interpreted the Fourteenth Amendment as requiring wholly "color-blind" or race-neutral governmental action; this view, of course, flatly forbids affirmative action programs.[88] Bork has described, but not adopted,

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democratic society. Now this is to be unlearned and we are told that this is not a matter of whose ox is gored. Those for whom racial equality was to be demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."); H. Wechsler, Principles, Politics and Fundamental Law xiii-xiv (1961); Mishkin, The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Actions, 131 U. Pa. L. Rev. 907, 908-09, 929-30 (1983); Graglia, Special Admission of the "Culturally Deprived" to Law School, 119 U. Pa. L. Rev. 283 (1970); Brief of Anti-Defamation League of B'nai Brith as Amicus Curiae, DeFunis v. Odegaard, 94 S. Ct. 1704 (1974); Kaplan, Equal Justice in an Unequal World: Equity for the Negro -- the Problem of Special Treatment, 61 N. W. L. U. Rev. 363 (1966); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 S. Ct. Rev 1; Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653 (1975).

88. Thus, Justice Douglas has written that "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory of how society ought to be organized." Justice Stewart and Stevens have also expressed substantially the same view in some of their opinions. Fullilove v. Klutznick, 448 U.S. 448 522, 532 (1980). See also Scalia, The Disease as Cure, 1979 Wash. U.L.Q. 147; A. Bickel, The Morality of Consent 133 (1975); N. Glazer, Affirmative Discrimination (1975); Fitch; The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus, 1979 Sup. Ct. Rev. 1.

For example, Professors Philip Kurland and Alexander Bickel filed a brief in the Supreme Court arguing that:

> "A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice. . . . A

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this view; instead, Bork takes the more moderate, but also widely-held, position that a state might demonstrate a compelling interest in maintaining an affirmative action program. In short, it is clear that Judge Bork's affirmative action views are firmly in the center of public debate, and in many respects, to the "left" of many respected jurists and commentators.

G. Vinson v. Taylor

Judge Bork has also been criticized for his opinion in Vinson v. Taylor.[89] These criticisms rest on misreadings of Bork's opinion and of the Supreme Court opinion that upheld Bork's views.

Vinson involved a Title VII claim by a female assistant branch manager of a bank; the plaintiff alleged that a vice president of the bank had sexually harassed her for some four years, and sought compensatory and punitive damages from the vice president and the bank. The individual defendant denied any sexual relationship with the plaintiff. After an eleven-day trial, the

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> quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base."

Brief of Anti-Defamation League of B'nai Brith as Amicus Curiae in DeFunis v. Odegaard, 94 S. Ct. 1704 (1974).

89. 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting from the denial of rehearing en banc).

district court refused to resolve the issue whether there had been sexual relations between plaintiff and defendant, holding instead that if sexual relations had occurred they were "voluntary" and thus not actionable. The district court also concluded that the bank had no knowledge of the dispute between its employees, and thus could not be held liable even if the vice president had sexually harassed the plaintiff.

A panel of the Court of Appeals reversed. It held: (1) the district court erroneously failed to consider whether the defendant had engaged in sexual harassment that created a hostile or offensive working environment;[90] (2) the district court erroneously admitted defense evidence of the plaintiff's willingness to engage in sexual relations and her solicitation of sexual relations;[91] and (3) the defendant bank was absolutely liable for any sexual harassment by the individual defendant, regardless whether the bank knew or should have known of the harassment.[92]

Judge Bork dissented from a denial of rehearing en banc. He squarely disagreed with the panel decision on two

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90. 753 F.2d 141, 145 (D.C. Cir. 1985).

91. Id. at 146 & n.36. The evidence in question was "testimony regarding [plaintiff's] sexually provocative dress and personal fantasies." Id.

92. Id. at 150.

issues: (1) evidence that the plaintiff "solicited or welcomed" sexual advances by the defendant should be admitted;[93] and (2) a strict rule of absolute liability for employers was inappropriate in sexual harassment cases, and should be informed by traditional principles of respondeat superior.[94] In addition, Judge Bork questioned the panel's definition of sexual harassment in a "hostile environment" case. Particularly in light of the panel's evidentiary holding, Bork criticized a rule of sexual harassment that would encompass all sexual relationships between employees, "however voluntarily engaged in" and without regard to whether the plaintiff had "welcomed" or made "a solicitation of sexual advances" from the defendant.[95]

The Supreme Court reversed the Court of Appeals from which Bork had dissented. Contrary to some suggestions,[96] the Supreme Court squarely adopted Bork's first two positions and substantially agreed with his third point. The Court squarely held that (1) "complainant's sexually provocative speech [and] dress . . . is obviously relevant to determining whether she found particular sexual advances unwelcome;"[97] and (2) in

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93. 760 F.2d 1330, 1331. Bork cautioned that such evidence was "hardly determinative" and that it must "obviously . . . be evaluted critically." Id.

94. Id. at 1331-1332 & nn.5 and 6.

95. Id. at 1330.

96. National Women's Law Center, at 27-30.

97. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 2407 (1986). Echoing Judge Bork, the Court held "the Court of

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determining the employer's liability "Congress wanted courts to look to agency principles for guidance," and "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[98] These were precisely the points Bork urged in his Court of Appeals dissent.

Finally, the Court substantially agreed with Judge Bork's view that the definition of sexual harassment must exclude relationships that were "solicited or welcomed by the plaintiff." According to the Court, "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."[99] This is substantially what Bork had urged in the lower court.[100]

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Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies 'had no place in this litigation.'" Id. at 2407.

98. Id. at 2408. Four Justices (Marshall, Brennan, Blackman and Stevens, JJ) would have resolved the employer liability issue in greater detail, albeit while still recognizing the applicability of common law agency principles. Id. at 2410-11.

99. 106 S. Ct. at 2406.

100. The Supreme Court also held that the district court "erroneously focused on the 'voluntariness' of respondents' participation in the claimed sexual episodes." Id. The Court explained that "the fact that sex-related conduct was 'voluntary' in the sense that the complainant was not forced to participate against her will, is not a defense." Id. Although Judge Bork's opinion refers to "voluntariness" at several points, it is clear that Bork did not intend to define sexual harassment in the nar-

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H. Equal Protection

Some critics have charged that Judge Bork would not afford women the guarantees of the Equal Protection Clause.[101] This view is plainly wrong, as these critics' failure to cite to Bork's writings would suggest.

Although Bork has not had occasion to address directly the Equal Protection Clause's application to women, his works plainly indicate that women are guaranteed equal protection of the laws. Initially, by its very terms, the Fourteenth Amendment's Equal Protection Clause forbids states from denying "any person . . . the equal protection of the laws." Judge Bork's well-known respect for Constitutional text would hardly lead him to conclude that women somehow do not qualify as "persons." Moreover, Bork has never questioned the Court's numerous, well-established precedents affording Equal Protection guarantees to all citizens.[102]

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row manner rejected as a defense to sexual harassment by the Court. Like the Court, Bork plainly was excluding from the definition of sexual harrassment only situations where the plaintiff solicited or welcomed sexual relations. Id. at 1330, 1331 ("however voluntarily engaged"; "solicitation of sexual advances"; "solicited or welcomed") (emphasis added).

101. ACLU, at 16.

102. Indeed, Bork has held that the Equal Protection Clause applies to "discrimination" based solely on the place of custody.

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More importantly, Bork has expressly recognized that the Equal Protection Clause protects men against sex discrimination.[103] It cannot seriously be suggested that Bork would allow men to bring Equal Protection claims based on sex discrimination, while denying women the same right. Moreover, Bork has explicitly declared that "[t]he Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities."[104]

While it is completely clear that Bork believes that the Equal Protection Clause applies to sex discrimination claims by men and women, he has not expressly addressed the precise standard of review that is appropriate in these cases. As discussed earlier, Bork has written that racial discrimination is

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Cosgrove v. Smith, 697 F.2d 1125, 1143 (D.C. Cir. 1983) (Bork, J., concurring and dissenting). Bork applied controlling Supreme Court precedent, calling for a rational basis test, to the plaintiffs' Equal Protection claims. McGinnis v. Royster, 410 U.S. 263 (1973).

103. Cosgrove v. Smith, 697 F.2d 1125,1143,1145-46 (D.C. Cir. 1983) (Bork, J., concurring and dissenting). In Cosgrove Bork denied the Government's motion for summary judgment on Equal Protection claims by male prisoners who alleged that female prisoners were unconstitutionally treated more favorably. Bork concluded that the male prisoners had stated a constitutional sex discrimination claim and remanded to the district court for development of the factual basis for the plaintiffs' claims.

104. Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (emphasis added).

"invidious"[105] and subject to strict scrutiny under the Equal Protection Clause.[106] He has also suggested that similar treatment is appropriate for religious and ethnic minorities, "among others."[107] Finally, Bork argued in Vorchheimer v. School District of Philadelphia, that the Equal Protection Clause prohibits the assignment of students to separate high schools, where the schools do not provide substantially equal educational facilities and professional opportunities.[108] Relying on language from Craig v. Boren, Bork argued that gender classifications must serve important governmental objectives and must be substantially related to achievement of those objectives."[109]

While not dispositively resolving the issue, these materials strongly suggest that Bork will apply some sort of intermediate scrutiny in sex-based Equal Protection cases. This is the same approach that the Supreme Court has recently adopted.[110] By all appearances, it is a more demanding test

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105. Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1984).

106. Bork, The Unpersuasive Bakke Decision, The Wall Street Journal, at 8, col. 4 (July 21, 1978).

107. Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

108. Memorandum for the United States as Americus Curiae in No. 76-37, affirmed by an equally divided Court (April 19, 1977).

109. Id. at 21, quoting Craig v. Boren, 429 U.S. 190 (1976). Bork did leave open the possibility that a State might be able to demonstrate sufficiently important reasons for single-sex institutions. He urged the Court to remand for a fuller exploration of the differences between the schools in question.

110. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

than that accepted by Justice Powell and other mainstream thinkers. [111]

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111. Justice Powell's position on the standard of scrutiny in sex discrimination cases is much like Chief Justice Rehnquist's. See Craig v. Boren, 429 U.S. 190 (1976) (Powell, U.S. 718 (1982) (Powell, J., dissenting; joined by Rehnquist, J.).See J. Ely, Democracy and Distrust 164-70 (1980).